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No. 80-1945

In the Supreme Court of the United States

OCTOBER TERM, 1981

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
APPELLANT

v.

DEPARTMENT OF INSURANCE, STATE OF WYOMING

ON APPEAL FROM THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether appellant is an instrumentality of the United States, so as to be immune from the regulatory and taxing provisions of the Wyoming Insurance Code under Article VI (the Supremacy Clause) of the United States Constitution.

2. Whether the application of the Wyoming Insurance Code to appellant's issuance of insurance policies to Wyoming residents on risks located in Wyoming, and the collection of premiums from these policyholders, impinges upon the authority granted to the United States by Article I and Article IV of the Constitution, on the ground that appellant conducts its operations solely from Fort Leavenworth, a federal enclave over which the United States has exclusive jurisdiction.

3. Whether the application of the Wyoming Insurance Code to appellant's issuance of insurance policies and collection of premiums on risks located in Wyoming violates the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.

4. Whether Wyoming's exercise of in personam jurisdiction over appellant violates the Due Process Clause of the Fourteenth Amendment.

5. Whether the Wyoming Insurance Code's failure to apportion the gross premium tax between appellant's activities at Fort Leavenworth and its transactions in Wyoming violates the Due Process Clause of the Fourteenth Amendment.

6. Whether appellant's cancellation of its contract of insurance with Lt. Col. Aparicio at appellee's request was an unconstitutional impairment of contract under Article I, Section 10 of the Constitution.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The findings of fact, conclusions of law, decision and order of the Wyoming Commissioner of Insurance (J.S. App. A68-A103) and the decision letter of the District Court of Laramie County of Wyoming (J.S. App. A64-A67) are not officially reported. The opinion of the Supreme Court of Wyoming (J.S. App. A1-A61) is reported at 622 P.2d 1318.

JURISDICTION

The judgment of the Supreme Court of Wyoming was entered on December 31, 1980. An order denying appellant's petition for rehearing was filed on February 19, 1981 (J.S. App. A104). The notice of appeal to this Court was filed on March 17, 1981 (J.S. App. A107-A108), and the jurisdictional statement was filed on May 18, 1981. The Supreme Court of Wyoming held in favor of the validity of state statutes, the validity of which was drawn in question on the ground of repugnance to the Constitution of the United States. Accordingly, the jurisdiction of this Court is conferred by 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of Articles I, IV, and VI and the Fourteenth Amendment to the United States Constitution, and the relevant portions of the Wyoming Insurance Code are set forth in J.S. App. A110-A112, A115-A128, and A135-A136. The relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. 1011-1013, are set forth in the Appendix, *infra*, 1a-2a.

STATEMENT

1. This is an appeal from a judgment of the Supreme Court of Wyoming (J.S. App. A105) affirming a district court judgment (J.S. App. A62) that affirmed an order of the Insurance Commissioner of Wyoming (J.S. App. A68). That order: (1) assessed a $5,000 civil penalty against appellant; (2) required that a 2.5% tax on insurance premiums collected by appellant on Wyoming risks during 1975 be computed

and paid; and (3) required that appellant cease and desist from further transacting insurance business in Wyoming, including the collection of insurance premiums on policies insuring risks located in Wyoming until it has secured a certificate of authority from the Wyoming Department of Insurance (J.S. App. A102-A103).

Appellant, an unincorporated non-profit military association organized in 1877, is a property and casualty insurer providing insurance coverage to eligible members of the armed forces. From its organization, appellant has maintained its only offices and employees on property owned by the United States as the United States military reservation at Fort Leavenworth, Kansas, a federal enclave over which the United States has exclusive jurisdiction.[1] Appellant's membership comprises approximately 88,000 active and retired warrant and commissioned officers in the armed services of the United States. Appellant is designated by both the Department of the Army and the Department of the Navy, and is recognized by the

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[1] Pursuant to the 1875 Kan. Sess. Laws, ch. 66, § 1 (reenacted as Kan. Stat. Ann. §§ 27-101 to 27-104 (1973)) (J.S. App. A113-A114), the State of Kansas ceded exclusive jurisdiction of the Fort Leavenworth Military Reservation to the United States, reserving the right to serve criminal and civil process thereon and to tax the property and franchises of any railroad, bridge, or other corporation within the boundaries of such lands. See *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525 (1885); *Benson* v. *United States*, 146 U.S. 325 (1892). Kansas reserved neither the right to control or to regulate business on this reservation (*Murphy* v. *Love*, 249 F.2d 783 (10th Cir. 1957)) nor the right to tax the appellant (*In re Armed Forces Cooperative Insuring Association*, 5 Kan. App. 2d 787, 625 P.2d 11 (1981)). At no time has the Kansas Insurance Commissioner sought to regulate appellant.

Department of Defense, as a non-profit military association (J.S. App. A6, A70-A71, A73).

Appellant is governed by an executive committee of five members, who are senior officers on active duty at Fort Leavenworth. Although these officers are elected by appellant's membership, they must obtain written approval of this activity from the Commanding General at Fort Leavenworth, and they serve on the executive committee at his pleasure.[2] The casualty insurance coverage on personal and real property issued by appellant is available to its members and to military personnel in the three highest enlisted grades, although these latter are not eligible for membership. Applications for membership and applications for insurance are made to appellant at Fort Leavenworth by mail, telephone, or personal visit, and require approval at a meeting of the executive committee. No salesmen or agents are employed by appellant and no commissions are paid by it to anyone. Appellant advertises the availability of its insurance, however, in the Army Times, the Air Force Times, and the Navy Times. Its members are encouraged to solicit new members.[3] All insurance contracts of the Association are prepared at Fort Leavenworth (J.S. App. A7, A52).

Appellant has never maintained any office, property, employee, representative, agent, telephone, post of-

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[2] We are informed that the requirement of approval by the Commanding General has no particular reference to appellant. Rather, it relates to any unofficial activity in which subordinate officers of the commander participate.

[3] Indeed, at least one non-commissioned Air Force officer stationed in Wyoming testified that he purchased a policy from appellant after being encouraged to call appellant's toll-free number by a fellow sergeant (J.S. App. A52).

fice box or address within the State of Wyoming or within the civil court jurisdiction and boundaries of any other state. Certain Wyoming residents subscribe to the above-mentioned periodicals in which appellant advertises. As of the date of the Insurance Commissioner's order, there were 99 Wyoming residents who insured their property with appellant. Of these, 84 had been insured with appellant prior to moving to Wyoming. Of the 15 persons who had established residence in Wyoming prior to becoming insured by appellant, three resided on the Warren Air Force Base in Cheyenne. In 1976, the total premium volume from appellant's ninety-nine policy holders in Wyoming was $11,005.70. Some requests for insurance and premium payments were mailed from Wyoming to appellant's office. All claims that may be allowed to Wyoming insureds are paid by appellant to their accounts at the Army National Bank at Fort Leavenworth, subject to withdrawal according to the pleasure and direction of the respective claimants. If there is a dispute as to a claim, the insured may designate an advisory board of three members of appellant to examine the validity of the claim, or may obtain statements from local police or firemen who may have investigated the loss, or from other disinterested witnesses, or may obtain the services of a professional adjuster at appellant's expense. Any disputes are finally reviewed and decided upon by appellant's staff and its Executive Committee at Fort Leavenworth (J.S. App. A7-A8, A52, A74-A75).

Appellant is not currently transacting new business with respect to residents and risks located in Wyoming, but it does continue collecting premiums on and servicing such Wyoming policies as remained in force at the time this action was brought (J.S. App. A8).

Appellant does not now have, nor has it ever had, a certificate of authority to transact insurance business in Wyoming. Moreover, appellant has never filed an annual report with or paid the annual premium tax to the appropriate Wyoming authorities. It is, however, willing to file its annual report voluntarily with the Wyoming Insurance Department if so requested (J.S. App. A8).

2. To transact insurance business in Wyoming, a person is required to have a certificate of authority from the Wyoming Insurance Commissioner (Wyo. Stat. §§ 26-1-111, 26-3-105 (1977); J.S. App. A115, A122-A123).[4] In addition, an authorized insurer may make a contract of insurance upon property or risks located in Wyoming only through a duly appointed and licensed resident of the state, who must be paid a minimum commission as specified by Wyo. Stat. § 26-3-130 (1977) (J.S. App. A126). Pursuant to Wyo. Stat. § 26-4-103 (1977) (J.S. App. A127-A128), each authorized insurer must file an annual report with the Wyoming Insurance Commissioner showing, *inter alia*, total direct premium income and other consideration for the insurance contracts covering property or risks located in Wyoming, and pay an annual tax of 2.5% upon net premiums and net consideration.

In August 1976, Lt. Col. Arthur Aparicio inquired of the Wyoming Insurance Department concerning appellant's status in Wyoming. Aparicio had recently purchased a new home in Cheyenne. He was in-

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[4] "Transacting insurance" includes solicitation or inducement, negotiations, effectuation of a contract of insurance, and transactions of matters subsequent to effectuation and arising out of such a contract (Wyo. Stat. § 26-1-110 (1977); J.S. App. A115).

formed by an Assistant Commissioner in the Wyoming Insurance Department that appellant had no certificate of authority to transact insurance in Wyoming and thus could not provide coverage for his property in Wyoming. Previously, Aparicio had obtained from appellant a policy of insurance on his home. Shortly thereafter, a representative of the mortgagee on Aparicio's new home inquired of the same Assistant Commissioner whether Aparicio's home was properly insured, and was told that unless appellant was a licensed insurer in Wyoming, it could not legally cover the property risk of a Wyoming resident. The Assistant Commissioner thereafter called a representative of appellant and advised appellant to cancel Aparicio's policy, and to refund the premium. Appellant complied with the request under protest, and without prejudice to contesting such action (J.S. App. A5, A71).

An administrative complaint was filed against appellant on September 15, 1976, alleging that it was transacting insurance business in Wyoming without a certificate of authority and without payment of the premium tax. Service of the complaint was made by mail upon appellant at Fort Leavenworth (J.S. App. A2-A4, A71-A72). Appellant entered a special appearance to contest the in personam jurisdiction alleged over it, and the applicability of the Wyoming Insurance Code to it on the grounds, *inter alia*, that it was exempt from Wyoming's tax and regulation under the Supremacy Clause of the Constitution as a federal instrumentality and that the imposed tax and regulation violated the Due Process and Commerce Clauses. The Wyoming Insurance Commissioner either rejected or failed to pass upon appellant's constitutional objections. Moreover, the Wyoming Insurance Commissioner assessed a $5,000 penalty against

appellant (see Wyo. Stat. § 26-1-115(b) (1977); J.S. App. A135) and ordered, *inter alia*, appellant to pay the 2.5% premium tax on its policies insuring risks located in Wyoming and to cease and desist from further transaction of insurance in Wyoming until it had complied with Wyoming insurance law (J.S. App. A68-A103). Appellant thereupon brought this suit in the District Court for the First Judicial District of Wyoming. The district court affirmed the State Insurance Commissioner's order (J.S. App. A62-A63, A64-A67). The Supreme Court of Wyoming affirmed (J.S. App. A1-A61).

ARGUMENT

The decision of the Supreme Court of Wyoming is correct and this case does not present any questions warranting plenary review.

1. The decision below properly concluded (J.S. App. A32-A37) that appellant is not a federal instrumentality entitled to immunity from state taxation and regulation under Article VI (the Supremacy Clause) of the Constitution. If appellant were an instrumentality of the federal government, the State of Wyoming would have no power to tax or regulate the insurance policies issued by appellant to Wyoming residents on Wyoming risks. See, *e.g.*, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *United States V. Mississippi Tax Commission*, 421 U.S. 599, 612-613 (1975); *Department of Employment* v. *United States*, 385 U.S. 355 (1966); *Mayo* v. *United States*, 319 U.S. 441, 445, 448 (1943); *Johnson* v. *Maryland*, 254 U.S. 51 (1920).

This Court has recognized that there is no simple test for determining whether an institution is so closely related to a governmental activity as to become a tax-immune instrumentality of the United

States. (*Department of Employment* v. *United States, supra*, 385 U.S. at 358-359; see also *First Agricultural National Bank of Berkshire County* v. *State Tax Commission*, 392 U.S. 339, 353-354 (1968) (Marshall, J. dissenting)). Nevertheless, the first inquiry has always been the statute or regulation authorizing the institution (*Department of Employment* v. *United States, supra*, 385 U.S. at 359; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483-484 (1942)). Without some statutory or regulatory authorization, there is no basis for concluding that an institution is a federal instrumentality. Cf. *Kalinski* v. *Commissioner*, 528 F.2d 969 (1st Cir. 1976).

Here, there is no statutory or regulatory basis for appellant's claim that it is a federal instrumentality. Appellant argues that it is a federal instrumentality because the Departments of Defense, Army and Navy recognize it as a nonprofit military association, that it has been permitted to conduct its activities on the federal enclave in valuable real estate for a token rent, and that the military command permits the five officers elected as its governing board by its members to act in that capacity. But none of these actions makes appellant a federal instrumentality; it is simply a voluntary association of individuals acting for their mutual benefit. That those individuals are active or retired members of the armed forces does not endow appellant with the attributes of a governmental instrumentality. To the contrary, it falls within the definition of a private organization on Department of Defense installations under 32 C.F.R. 212.7(c),[5] or of a private organization on Department of Army

[5] A private organization is defined in 32 C.F.R. 212.7(c) as "[a] generally self-sustaining, non-Federal entity, incorporated or not, and constituted or established and operated on a DoD installation, with the written consent of the installation com-

installations under AR 210-1(3)(c) (1974). Both of those regulations specifically provide that such private organizations are not instrumentalities of the military department.[6]

2. As the court below held (J.S. App. A28-A29), there is likewise no basis for appellant's further argument (J.S. 10-15) that it is not subject to Wyoming tax or regulation because its offices and employees are located on a federal enclave subject to the exclusive jurisdiction of the United States. In view of the federal government's exclusive jurisdiction over Fort Leavenworth, on which appellant has its offices and employees, Wyoming can exercise no jurisdiction over appellant with respect to its activities on the federal enclave. See *Humble Pipe Line Co.* v. *Waggoner*, 376 U.S 369, 371 (1964), and the cases cited at J.S. 10. But the State of Wyoming does not seek to regulate and tax appellant for what it does on the federal enclave or elsewhere outside of the State of Wyoming. Instead, Wyoming seeks to have appellant conform to Wyoming laws with respect to insurance policies held by residents of Wyoming on risks to real and personal property located in Wyo-

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mander or higher authority, by individuals acting exclusively outside the scope of any official capacity as officers, employees, or agents of the Federal Government." A similar definition is set forth in AR 210-1(3)(c).

[6] In *Standard Oil Co.* v. *Johnson, supra,* in *United States* v. *Mississippi Tax Commission, supra,* and in *Champaign-Urbana News Agency, Inc.* v. *J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980), post exchanges, commissaries and/or officers' clubs were found to be instrumentalities of the federal government. But these organizations are not comparable to appellant because they were established by specific regulations. Indeed, the military exercises far more extensive control over these institutions than over appellant or those other private organizations mentioned in 32 C.F.R. 212 or in AR 210-1.

ming. Indeed, the Court's decision in *Robertson* v. *California*, 328 U.S. 440 (1946), provides a complete answer to appellant's arguments.[7] That case involved a prosecution for violation of California insurance law by acting on behalf of a nonadmitted Arizona mutual insurance company. The Court stated (*id.* at 461):

> [T]he only objection advanced which is independent of commerce clause considerations is that to sustain the state's requirements, particularly in so far as they exclude the Society from interstate operations in California and thus also appellant's activities in aid of its business, will be in effect to project California's laws into other states, here

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[7] The cases upon which appellant relies (J.S. 14) are distinguishable. *Oil, Chemical & Atomic Workers* v. *Mobil Oil Corp.*, 426 U.S. 407 (1976), involved the application of the Texas right-to-work laws to seamen, whose job situs is on the high seas, but who have significant contacts with Texas. The Court held that the job situs controlled the applicability of the particular labor law. In *Vincent* v. *General Dynamics Corp.*, 427 F. Supp. 786 (N.D. Tex. 1977), the court was faced with applying the appropriate labor law where facilities were partly within Texas and partly within a federal enclave where the Texas right-to-work laws did not apply. Following *Oil, Chemical*, the district court held that because most of the job situs was in the federal enclave and the job situs was not divisible, the policy of practicality that governs interpretations of federal labor laws precluded the application of the Texas right-to-work laws to any part of the job situs. These federal labor policies have no application here. Finally, *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934), merely stands for the proposition that California could not require a local distributor to pay California tax on gasoline sold in a federal enclave subject to the exclusive jurisdiction of the federal government. See *Sollitt & Sons Construction Co.* v. *Commonwealth*, 161 Va. 854, 172 S.E. 290, appeal dismissed, 292 U.S. 599 (1934), where the court held that the state could levy a tax on a builder whose operations in constructing a post office extended beyond the federal enclave in which the post office was located.

presumably Arizona, and regulate the Society's activities there. The contention is obviously without merit. Nothing which California requires touches or affects anything the Society or appellant may do or wish to do in Arizona or elsewhere than in California. *Hoopeston Co.* v. *Cullen*, [318 U.S. 313 (1943)].

3. The decisions of this Court establish beyond question that a state may protect its citizens and residents by requiring that any company selling them insurance on local risks must first establish its financial responsibility by obtaining a license conditioned upon satisfying standards established by the state, and then by complying with the state's regulations looking further to that end. Thus, amost 80 years ago at the outset of its opinion in *Nutting* v. *Massachusetts*, 183 U.S. 553 (1902), the Court announced that (*id.* at 556): "A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the State may prescribe, not interfering with interstate commerce."

There are accordingly few constraints that the Commerce Clause imposes upon state legislation regulating the sale of insurance, whether by interstate or by local transaction. Even after the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944), and before the McCarran-Ferguson Act, 15 U.S.C. 1011-1013, removed such constraints upon state regulation of insurance as the Commerce Clause might have been thought to impose (*Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946); *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, No. 79-1423 (May 26, 1981)), this Court held that neither the Commerce Clause nor the Fourteenth Amendment pre-

vented a state from prohibiting nonadmitted insurers from selling insurance on local risks to its residents, and from controlling the types and terms of insurance that admitted insurers were permitted to sell. *Robertson* v. *California*, *supra*.[8] More recently, the Court has upheld the power of a state to exclude, or require a license from, an insurance company operating a purely mail order insurance business from another state without agents or employees in the state to whose citizens and residents it sought to sell insurance. *Travelers Health Association* v. *Virginia*, 339 U.S. 643 (1950); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

These decisions establish the power of Wyoming to exclude appellant from selling insurance on Wyoming risks to Wyoming residents until it is licensed, and to condition the issuance of a license upon compliance with the terms of Wyoming's Insurance Code.

4. a. The decisions of this Court are not as clearly controlling in upholding the taxing provisions (Wyo. Stat. § 26-4-103) that impose upon appellant a tax

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[8] The Court had earlier upheld the application of New York law regulating insurance companies to an Illinois cooperative insurance association organized much like the appellant in this case that was seeking to sell casualty insurance from its base in Illinois to New York insureds on New York risks. *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943). The New York statute upheld by the Court required that the Illinois association, although it executed all the contracts of insurance at its headquarters in Illinois, obtain a license conditioned upon submission to New York regulations aimed at protecting the solvency of the association or at promoting the convenience of New York residents in their insurance business. In the absence of a New York license, the association was prohibited from doing any act that affected, aided, or promoted the doing of insurance business in New York. See also *State Farm Insurance Co.* v. *Duel*, 324 U.S. 154 (1945).

upon premiums on policies issued to Wyoming residents upon Wyoming risks as they are in upholding Wyoming's power to regulate appellant's business. Nevertheless, we believe that there is no substantial question as to Wyoming's power to tax appellant's gross premiums earned from policies issued to Wyoming residents.

Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012, removes whatever Commerce Clause constraints that may have existed upon the power of Wyoming to tax, as well as to regulate, the business of insurance. *Prudential Insurance Co.* v. *Benjamin, supra; Western & Southern Life Insurance Co.* v. *State Board of Equalization, supra.* This Court held, however, in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), that the McCarran-Ferguson Act did not authorize, and the Due Process Clause of the Fourteenth Amendment prohibited, the State of Texas' imposition of a tax on premiums paid on casualty and liability insurance with respect to property in Texas where all other incidents of the insurance and all transactions regarding it were located or took place outside Texas.*

But the facts of this case are distinguishable from *Todd Shipyards.* Here, the property insured by appellant was located in Wyoming, the insurance was issued to Wyoming residents, the applications and premiums were forwarded from Wyoming, the claims and adjustments originated from Wyoming, and payment was made, if not by check or currency forwarded to Wyoming residents, by bank credits of equal value payable on their order (see page 5,

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* There is no basis for appellant's argument (J.S. 21) that Wyoming was without in personam jurisdiction over it in view of this Court's decisions to the contrary in *Travelers Health Association* v. *Virginia, supra,* and *McGee* v. *International Life Insurance Co., supra.*

supra). In sum, the panoply of contacts between appellant's insurance transactions and the State of Wyoming far exceeded the minimal single contact between the insurance company and the State of Texas in *Todd Shipyards.*[10]

b. Appellant further argues (J.S. 21-23) that the Wyoming tax violates the Due Process Clause because it was not apportioned. It therefore challenges the ruling below (J.S. App. A54-A58) that the tax imposed upon net premiums collected on appellant's policies issued to Wyoming residents on Wyoming risks does not violate the Due Process Clause of the Fourteenth Amendment. But Wyoming has already apportioned its tax on appellant to take into account appellant's non-Wyoming activities by taxing only appellant's Wyoming premiums. All that the Due Process Clause requires is that there be a rational relationship between the income attributable to the

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[10] The Court there stated as follows (370 U.S. at 454-455):

> The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.
>
> The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas.

state and the intrastate values of the enterprise. *Exxon Corp.* v. *Department of Revenue of Wisconsin*, 447 U.S. 207, 219 (1980). Indeed, where a state treats a taxpayer engaged in multi-state commerce as a unitary enterprise for purposes of state income or gross receipts taxation and apportionment is required by the Due Process Clause, this Court has held that the use of a single factor, such as gross sales, to make this apportionment is permitted by the Due Process Clause. *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267 (1978).

Although we agree with the decision below, we recognize that *National Liberty Life Insurance Co.* v. *State*, 62 Wis.2d 347, 365-369, 215 N.W.2d 26, 35-37 (1974), appeal dismissed, 421 U.S. 940, cert. denied, 421 U.S. 946 (1975), appears to support appellant's position on apportionment. The Court in *National Liberty*, however, principally relied on *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553 (1965), where this Court held that apportionment by a single-factor sales formula was not authorized by the District of Columbia Code. Although the Supreme Court of Wisconsin was of the view that this Court would have reached the same result if it addressed the constitutionality of a single-factor sales formula (see 62 Wis.2d at 367-369, 215 N.W.2d at 36-37), the Court subsequently made clear in *Moorman Manufacturing Co.* v. *Bair*, *supra*, 437 U.S. at 275, its *General Motors* decision took no position on the use of a single-factor formula of apportionment under the Due Process Clause of the Fourteenth Amendment. If the Supreme Court of Wisconsin had had the benefit of this Court's later decision in *Moorman Manufacturing Co.* upholding the constitutionality of a single factor gross sales formula, it presumably

would have rendered a decision in accord with the decision below.

5. Finally, there is no merit in appellant's contention (J.S. 25) that the cancellation of its insurance policy with Lt. Col. Aparicio at the Wyoming Insurance Department's request constituted an unconstitutional impairment of contract by Wyoming in violation of Article I, Section 10 of the Constitution. Obviously, if appellant was subject to the laws of Wyoming at the time the contract was issued, the contract was unenforceable if it was issued in violation of those laws. Cf. *Griffin* v. *McCoach*, 313 U.S. 498 (1941).

CONCLUSION

The appeal from the judgment of the Supreme Court of Wyoming should be dismissed for want of a substantial federal question.

Respectfully submitted.

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DECEMBER 1981

APPENDIX

McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq*:

Section 1 [15 U.S.C. 1011]. *Declaration of Policy*

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2 [15 U.S.C. 1012]. *Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948*

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 3 [15 U.S.C. 1013]. *Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation*

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act [15 U.S.C. 41 et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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